No. 7765

United States
Circuit Court of Appeals
For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE AND TRUST COMPANY, as Trustee,
Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

MOTION OF APPELLEE GEORGE E. LILLEY, TRUSTEE IN BANKRUPTCY, TO STRIKE STATEMENT OF EVIDENCE AND BRIEF AND ARGUMENT THEREON

THOMAS W. NEALON,
ALICE M. BIRDSALL,
Phoenix, Arizona

Counsel for Appellee, George E. Lilley.

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COMES NOW George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, one of the appellees herein, by Thomas W. Nealon and Alice M. Birdsall, his counsel, and moves this court to strike from the record in this cause the Statement of Evidence filed herein by the appellants upon the following grounds:

1. That the said statement is not a true, complete and properly prepared statement in accordance with the mandatory provisions of Equity Rule 75, subdivision b, and is not properly settled nor certified in accordance therewith; that the same does not contain a "condensed statement in narrative form of the evidence and testimony of witnesses essential to the decision of the questions presented by the appeal"; that there is omitted from said statement many matters essential to the decision of the questions presented by the appeal and that other matters are included therein which are incorrect and contradictory as well as wholly immaterial and irrelevant matter.

2. That said statement was assumed to be settled by a judge other than the trial judge without notice to this appellee and without affording this appellee any opportunity to present to the court or judge the matter raised by his objections and proposed amendments to the proposed Statement of Evidence lodged by appellants, which objections and proposed amend-

ments were filed by this appellee on June 30, 1936, and within the time allowed by order of the trial court therefor.

3. That subsequent to the filing by this appellee of his objections and proposed amendments on June 30, 1936, no notice fixing a time for hearing the said proposed statement lodged by appellants and the objections and proposed amendments of this appellee thereto, was ever given to this appellee, and no time and place for presenting the same to the court or judge was ever fixed.

4. That no hearing was had by a court or judge upon the questions raised by the proposed Statement of Evidence as lodged and the objections and proposed amendments of this appellee thereto, subsequent to the filing of the objections and proposed amendments of this appellee to said proposed Statement of Evidence on June 30, 1936.

5. That the Hon. Dave W. Ling, the judge who assumed to settle said Statement of Evidence and certified it as correct, was without jurisdiction to settle, allow or approve the same or to certify to its correctness, for the reason that he was not the trial judge in said proceedings and had no knowledge as to the truthfulness or correctness of matters certified by him to be true and correct and which matters in fact were, in many instances, not true and correct, and that the trial judge, who alone could have settled and approved said Statement of Evidence as true and correct, was at the time of the lodging of said proposed Statement of Evidence and of the filing of the objections and proposed amendments thereto of this appellee, and at all

times since, within the district of Arizona and ready, willing and able to settle, allow and approve said Statement of Evidence and the objections and amendments thereto of this appellee.

6. That the certificate of said Hon. Dave W. Ling, the judge who assumed to settle said Statement of Evidence, to the effect that the same is a full, true and correct Statement of Evidence on said appeals, is incorrect and that statements contained in his said certificate are contradicted and shown to be incorrect and untrue by the record herein, especially in the following particulars, to-wit:

(a) That said statement does *not* contain "all the evidence and proceedings certified by the Referee," and that some of the proceedings certified by the Referee are omitted therefrom.

(b) That it does *not* contain "all the evidence and proceedings reveiwed by the District Court in said cause" because there were numerous hearings and proceedings on said review before the *trial judge* at which admissions and stipulations were made by counsel, matters presented to the court and notes taken thereon by the trial judge, to which no reference is made in said Statement of Evidence as approved and allowed.

(c) That said Statement contains recitals regarding the evidence and proceedings certified and reviewed which are *not* true, full and correct (as certified) and not supported by any authoritative record.

(d) That said certificate of said judge incorrectly states that " all of the evidence is stated

in condensed and narrative form except as to where the parties failed to agree as to what the narrative should be" whereas many pages of matter which was not testimony but colloquy and argument of counsel and other wholly irrelevant matter, have been copied verbatim from the reporter's transcript and inserted therein.

(e) That said Statement of Evidence assumed to be settled and certified by said judge as correct, contains insertion of matter which was not included in the original Statement lodged by appellants nor in any amendments proposed by this appellee, or any other appellee, and of the inclusion of which in said Statement, this appellee had no notice and no opportunity to object thereto;

That timely objections were made by this appellee to all of the matters herein raised, as appears from the record herein.

WHEREFORE, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, appellee herein, prays that said Statement of Evidence be stricken from the record herein.

THOMAS W. NEALON,

ALICE M. BIRDSALL,
Counsel for George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, Appellee.

STATE OF ARIZONA
COUNTY OF MARICOPA } ss.

Alice M. Birdsall, being first duly sworn, doth depose and say:

I have read the within Motion of Appellee Lilley to Strike Appellants' Statement of Evidence from the Record, and know the contents thereof; and that the statements contained therein are true according to the best of my knowledge, information and belief.

ALICE M. BIRDSALL.

Subscribed and sworn to before me this 22 day of April, 1937.

(Seal)

GEORGE M. HILL,
Notary Public in and for
Maricopa County, Arizona.

My commission expires March 17, 1939.

BRIEF IN SUPPORT OF MOTION TO STRIKE

STATEMENT OF FACTS RELATING TO MOTION TO STRIKE

February 5, 1935, appellants herein filed in the District Court their petition for appeal from an order of the Hon. F. C. Jacobs, United States District Judge for the District of Arizona, approving and affirming on review an order of the Referee in Bankruptcy, "marshalling and determining liens on property of the bankrupt and ordering sale of property," entered by the Referee in the Bankruptcy Court on September 17, 1932 (Tr. 111-123) and appeal to this court was allowed by said Honorable F. C. Jacobs the same day.

The decision of the Referee after hearings theretofore conducted and briefs submitted in said matter, was announced March 22, 1932 and counsel directed to prepare decree and findings in accordance therewith (Tr. 168). The decree was thereafter prepared by counsel for the Trustee in Bankruptcy and on July 27, 1932, at the request of counsel for appellant Barringer, counsel for the Trustee agreed by stipulation in writing (subject to approval by the Referee) that the entering of the order and decree would be deferred to a time subsequent to September 15, 1932, this being for convenience of counsel for appellant Barringer who desired to leave on a vacation. The order as prepared by counsel for the Trustee, and said stipulation, were, on July 27, 1932, presented to the Referee in Bankruptcy who thereupon made his written order deferring the entering of said decree until *after* September 15, 1932, in accordance with said stipulation (Tr. 168-Ex. B)

Appellants Barringer and the Phoenix Title and Trust Company filed petitions for review of the Referee's order September 29, 1932 (Tr. 259, 353), and November 18, 1932, the Referee transmitted his certificate on review designating the questions to be reviewed and certifying the papers and proceedings sent up by him on said review (Tr. 321, 374.) The stipulation above referred to and the order thereon were included in the papers certified by the Referee on review and are now on file in the clerk's office but are made no part of the Statement of Evidence although a part of the Referee's Record on Review (Ex. B). In the office of the clerk of the District Court for the District of Arizona, there were on file

at said time in said cause in addition to those transmitted by the Referee, various papers and proceedings including the Voluntary Petition and Schedules of Bankrupt, Amended Schedules of Bankrupt, and Order of Adjudication. None of these were made a part of the Statement of Evidence notwithstanding the certificate recites that it contained all the proceedings reviewed by the district judge, yet long after the transmission of the Statement of Evidence and the expiration of time to file the record in this court, appellants by praecipe have had sent up and made part of the Transcript of Record, the petition and *original Schedules without including the Amended Schedules which superseded them* and without including other pleadings and papers on file in said clerk's office.

Hearings and arguments on said petitions for review and proceedings therein were had before the Hon. F. C. Jacobs over a period of approximately two years (Tr. 96-110). Having obtained numerous orders subsequent to the taking of said appeal on February 5, 1935, extending time for filing same, the appellants on May 6, 1936 lodged in the office of the clerk of the United States District Court at Phoenix a proposed Statement of Evidence consisting of two volumes comprising 364 typewritten pages and on said day served upon appellee Lilley, Trustee in Bankruptcy, notice of said lodging and setting May 18, 1936 as the date for presenting the same for approval to said Hon. F. C. Jacobs, on which latter date the matter was continued to May 25, 1936 (Tr. 157). On May 19, 1936, appellee, Lilley, filed a motion for extension of time in which to examine and prepare objections to said voluminous proposed statement. May 25, 1936, the matter

of settling said Statement of Evidence and the Trustee's motion for extension of time to file objections were heard by said Hon. F. C. Jacobs who made his order on said date granting appellee, Lilley, to and including July 1, 1936 in which to prepare and file objections to said proposed Statement of Evidence and extending the time for appellants to secure approval and settlement thereof to August 1, 1936 (Tr. 691).

June 30, 1936, appellee, Lilley, served upon appellants his objections and proposed amendments to appellants' said proposed Statement of Evidence and filed the same in the clerk's office in Phoenix (Tr. 684-780).

July 6, 1936, the Hon. F. C. Jacobs made the followings order in said proceedings:

> "It appearing to the undersigned United States District Judge that it is necessary to protect the rights of the parties in the above entitled cause,—
>
> IT IS ORDERED that the time within which respondents Margaret B. Barringer and Phoenix Title and Trust Company may present, obtain approval and settlement, and file the Statement of Evidence, as required by Equity Rule 75, and the time within which said respondents may file the record and docket their case on appeal to the United States Circuit Court for the 9th Circuit, be and the same hereby are each respectively, extended until and including the 15th day of October, 1936.
>
> Dated this 6th day of July, 1936.

F. C. JACOBS,
United States District Judge.

(Endorsed): Filed July 20, 1936."

(Tr. 780-781).

Said matter was not presented to the court or judge on August 1st nor on October 15, 1936, and no notice of any time and place at which said proposed statement and amendments or objections thereto would be presented to the court or judge (except said notice of May 6, 1936 setting May 18, 1936 as the time therefor), was ever served upon appellee, Lilley, who had no notice of any further proceedings with respect to the settlement of appellants' Statement of Evidence until Saturday October 31, 1936, at which time counsel for appellee, Lilley, received from the clerk of the District Court at Phoenix a letter dated October 30, stating that an order had been entered Ocober 29, 1936 by the Hon. Dave W. Ling settling, approving and certifying the Statement of Evidence. Counsel for said appellee, Lilley, were not present when said order was made and had no notice or knowledge of the time and place when, or the manner in which, said Statement of Evidence had been settled or what changes, if any, had been made in the original proposed statement lodged, and their only knowledge concerning the contents of same was from examination of the Statement of Evidence filed on October 29, 1936 and certified by the Hon. Dave W. Ling as correct, which Statement comprised more than 365 typewritten pages. Said examination showed matter inserted (page 194-a of said Statement) (Tr. 410) and (by interlineation, page 351) (Tr. 660) of matter *not* in the proposed

Statement as lodged and *not* covered or referred to in any proposed amendments, and by the insertion of which in this maner this appellee was given no opportunity to object and propose amendments thereto; and also showed included therein many pages of garbled and incorrectly stated so-called "narrative" in which the language of witnesses had been so changed that the meaning of the testimony was destroyed; also, inserting dozens of pages of colloquy, argument, discussions and immaterial and irrelevant matter (Tr. 523-537, 550, 634,638, 659-665) having no place in a Statement of Evidence and to all of which this appellee had objected, and had submitted proposed amendments in which testimony had been properly condensed and improper and irrelevant matter eliminated (Tr. 695-780).

There are many other discrepancies of matter incorrectly stated and contradictions in the statement as certified, too numerous to specify here, which are incident to an attempted settling of such a record by a judge not the trial judge and whose total unfamiliarity not only with the record and proceedings, but with the issues involved, rendered it impossible for him to fairly settle the Statement of Evidence and certify the same as correct in accordance with Equity Rule 75.

November 4, 1936, appellee, Lilley, filed in said cause a motion to vacate the said order entered October 29, 1936, settling and certifying the Statement of Evidence, setting out in said motion wherein said Statement was incorrect and untrue and further setting out that said Hon. Dave W. Ling was without jurisdiction to settle and certify as correct said Statement of Evidence because he was not the trial judge

and had no knowledge of the matters which he assumed to certify as correct, said motion being supported by affidavit of counsel for appellee, Lilley (Tr. 786-794). Upon order of Hon. Dave W. Ling made November 9, 1936 at the request of appellant Barringer, the time for hearing said motion was shortened to one day (Tr. 795) and the same was argued before said Hon. Dave W. Ling on November 10, 1936, on which day said Hon. Dave W. Ling entered an order denying said motion (Tr. 797).

No evidence was taken by said Hon. Dave W. Ling to support the matters in the record certified by him as being full, true and correct, and of which he could have had no knowledge.

BRIEF OF ARGUMENT

Equity Rules have the force of law and Equity Rule 75 must be complied with in the preparation and certification of Statement of Evidence on Appeal.

Trust Co. of Florida v. Gault (5 C.C.A.) 69 Fed. (2) 133;

Barber Asphalt Pav. Co. v. Standard Asphalt & R. Co., 275 U. S. 372, 72 L. Ed. 318;

Newton v. Consolidated Gas Co., 258 U. S. 165, 66 L. Ed. 538;

Houston v. Southwestern Bell Tel. Co., 259 U. S. 318, 66 L. Ed. 961;

In re Syracuse Stutz Co., (2 C.C.A.) 55 Fed. (2) 914;

In re National Public Service Corp. (2 C.C.A.) 68 Fed (2) 859, (861);

Pittsburgh C. C. & St. L. Ry. Co. v. Glinn (6 C.C.A.) 208 Fed. 989;

Coxe v. Peck-Williamson Heating & Ventilating Co. (5 C.C.A.) 208 Fed. 409;

Buckeye Cotton Oil Co. v. Ragland (5 C.C.A.) 11 Fed. (2) 231;

The Statement of Evidence in an equity case must be approved and settled by the trial judge.

Equity Rules 75 and 46;

In re Equity Rule 75 (6 C.C.A.) 222 Fed. 884, (886);

Buessel v. U. S. (2 C.C.A.) 258 Fed. 811;

In re Silverstein (9 C.C.A.) 35 Fed. (2) 497;

First Nat. Bank of Ardmore v. Bonner (10 C.C.A.) 74 Fed. (2) 139;

Barber Asphalt Pav. Co. v. Standard Asphalt &R. Co., supra;

Bill of Exceptions *must* be signed by *trial judge.*

Maloney v. Adsit, 175 U. S. 281, 44 L. Ed. 163;

Preparation and approval of Statement of Evidence under Equity Rule 75, is same as Bill of Exceptions.

Sommer v. Rotary Lift Co. (9 C.C.A.), 66 Fed. (2) 809;

In case of death or disability of trial judge, certificate must show reason why not signed by trial judge.

Ulmer v. U. S. (2 C.C.A.) 266 Fed. 176;

Norwood v. U. S. (4 C.C.A.) 18 Fed. (2) 577;

A retired Federal judge is still in service and may hold court in his District without designation.

Maxwell v. U. S. (4 C.C.A.) 3 Fed (2) 906;

McDonough v. U. S. (9 C.C.A.) 1 Fed. (2) 147;

Booth v. U. S., 291 U. S. 339; 78 L. Ed. 836;

ARGUMENT

It is the contention of this appellee that his motion to strike the so-called Statement of Evidence should be granted for the reason that it indubitably appears from the record that the said Statement is neither prepared, settled nor certified in accordance with Equity Rule 75-b and is not a true and complete statement of the matter required by said rule to be included therein and which is essential to the examination of the questions on this appeal. The points upon which the motion is grounded can be briefly summarized as follows:

First: That the whole statement is improperly prepared, contains much matter wholly irrelevant and not properly included in a statement, as well as other matter incorrectly stated and that the statement should have been by the trial judge ordered properly prepared in accordance with Equity Rule 75-b as set forth in the objections thereto filed by this appellee on June 30, 1936.

Second: That only the trial judge who heard and determined the reviews of the Referee's order and was

familiar with the proceedings and the matters before him and which were considered by him on said reviews, had jurisdiction and was qualified to settle the disputed questions raised by the Statement lodged and this appellee's objections and proposed amendments thereto, and to direct the making of a "full, true and correct" statement since he alone knew the true facts in connection with the proceedings had.

Third: That both Statements of Evidence in equity cases and Bills of Exception in law cases, *must* be authenticated by the judge who tried the case except in cases of death or disability, in which cases, proof of the matters certified to by him must be taken by the judge who settles the record and the certificate must show why he and not the trial judge allowed the same.

Fourth: That no notice of a time and place for the presentation to the court or judge for settlement of the Statement proposed and the objections and amendments of this appellee thereto, was given to this appellee and that he had no opportunity to urge his objections to the Statement and to submit the same to the judge and to point out wherein said Satement was *not* true, complete or properly prepared and had no opportunity whatever to object to the insertion of new matter which was never lodged in court.

Fifth: That the said Statement was assumed to be settled and certified as correct by a judge not the trial judge, although the trial judge was in the District, was *not* under any disability and was ready and willing to settle the same had it been presented to him; that many of the matters certified to by the judge who as-

sumed to settle the Statement as true and correct are contradicted by the record itself.

This appellee submits that the most cursory examination of the Statement of Evidence herein must reveal that it is not true, complete and properly prepared in the manner definitely required by Equity Rule 75, but that it contains a great mass of what Circuit Judge Learned Hand pertinently terms "amorphous matter" not proper therein, and that notwithstanding the certificate of a judge *who was not the trial judge* authenticating the same, it should be stricken from the record here.

> "The equity rules have the force of law and cannot be overridden by an order of the District Judge or by consent of parties."
>
> Trust Co. of Florida v. Gault (5 C.C.A.) 69 Fed. (2) 133, (136);
>
> "Equity Rules 75 and 76 direct that records on appeal shall not set forth the evidence fully but in simple, condensed form, and require omission of nonessentials and mere formal parts of documents. Without apparent attempt to comply with these rules, and with assent of appellee's counsel, appellants ***** have filed a record of 21 volumes ***** made up largely of stenographic reports of proceedings before the master, with hundreds of useless exhibits and many thousand pages of matter without present value. This is indefensible practice which we shall hereafter feel at liberty to punish to the limit of our discretion—possibly by dismissal of the appeal. These rules were in-

tended to protect the courts against useless, burdensome records, and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial courts should enforce performance of this plain duty."

Newton v. Consolidated Gas Co. 258 U. S. 165, 66 L. Ed. 538;

"It also contains ***** a mass of immaterial matter, such as preliminary questions and answers, repetitions, comments of counsel, and colloquies between them and the commissioner. We are now invited to separate the wheat from the chaff. We are expected to select out the testimony that is material in order that we may determine whether assignments of error based upon it are well taken ****. It hardly can be contended that this order was intended to displace the previous requirement which meant that the testimony should be stated in a simple, concise and narrative form, and in no event did it contemplate an inclusion in the transcript of anything but testimony. **** That rule (75) was designed to prevent the imposition of such a record as this upon an appellate court. ***** It would not serve its purpose if it could be ignored at pleasure, and be supplanted by the easier, though more expensive method of printing everything that is said by anybody connected with the case during the taking of testimony."

Buckeye Cotton Oil Co. v. Ragland (5 C. C. A.) 11 Fed. (2) 231;

"Before proceeding to the main issues, we wish

to say a word about the record submitted on each appeal ****** especially in insolvency there has grown up a practice of treating as a "Record" any amorphous mass of colloquy, without warrant for existence ******. They may have stenographers in court if they will, or dictaphones for that matter, but the district judges are not to send up the minutes."

In re National Public Service Corp. (2 C. C. A.) 68 Fed. (2) 859 (861) (Judge L. Hand)

"Incorporation of 'minutes' consisting of stenographic report of colloquy between court and counsel, in record on appeal, held improper, though order appealed from recited that it was based on 'minutes'," Par. 7. Syl.

In re Syracuse Stutz Co. (2 C.C.A.) 55 Fed. (2) 914.

To same effect, see:

Houston v. Southwestern Bell Tel. Co., 259 U. S. 318, 66 L. Ed. 961;

Barber Asphalt Pav. Co. v. Standard Asphalt & R. Co., 275 U. S. 372, 72 L. Ed. 318;

Pittsburgh C.C. & St. L. Ry. Co. v. Glinn, (6 C. C.A.) 208 Fed. 989;

Coxe v. Peck-Williamson Heating & Ventilating Co., (5 C.C.A.) 208 Fed. 409;

It must be borne in mind that in the instant case there has been no consent on the part of this appellee to the inclusion of extraneous matter in the record, but

that objection thereto has been made at every stage of the proceedings. As provided by the Bankruptcy Act, the Referee made up and transmitted to the Hon. F. C. Jacobs, as a part of the Certificate of Review, a "Summary of the Evidence" which this appellee believes to be a fair and entirely adequate record upon which to determine the questions on review. Appellants were dissatisfied with this record and filed a motion with the District Judge to have sent up as a part of the record on review the "reporter's transcript" of the proceedings before the Referee. This transcript was not filed with the Referee until some three weeks after his decision was announced, and he did not include it in his record, stating his reasons therefor in his letter of transmission of the record to the District Judge. In addition to this, it would seem clear from many decisions of various courts and from the language of Bankruptcy General Order No. 27, that the Referee must prepare and transmit to the District Judge on review *his summary of the evidence*,—not a reporter's notes thereof. The motion of appellants to have the reporter's notes sent up in this case was eventually granted by Judge Jacobs, and on praecipe of appellants they have been sent up as a part of the record here, but it will be noted that the correctness of same are not certified *by either the Referee or the trial judge*, only by the court reporter. It is inconceivable that Judge Jacobs, in reviewing the Referee's order considered the mass of irrelevant and immaterial colloquy, argument and "speeches" found in the reporter's notes, and which have no place in *any* record but which have been inserted in the Statement of Evidence and certified by Judge Ling *as part of the record considered by Judge Jacobs*. It is elementary that on

review the judge determines the matter on the competent evidence in the record.

As was said in the case of In re De Gottardi (Cal.) 114 Fed. 328:

> "Upon a review the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issues de novo upon the competent evidence in the record, or he may recommit the case for further hearing as the circumstances may require."

It is fair to suppose that Judge Jacobs, objections having been made to the Referee's Summary of Evidence, had the reporter's notes sent up in order to be fully advised and that he might determine whether there was sufficient competent evidence introduced before the Referee to support the order made by him. In any event the fact remains that Judge Jacobs alone was qualified to certify as to the correctness of the record here, and the aspersion of having "considered on review" the heterogenous collection of matter included in this Statement of Evidence should not be cast upon him involuntarily.

This appellee made timely objection to the inclusion of the reporter's notes on the review before the District Judge, and after the lodging of the proposed Statement of Evidence by appellants, within the time allowed by order of court, made objections to the manner in which said proposed Statement had been prepared, and also filed proposed amendments to what was termed the "condensed statement of evidence" con-

tained therein, said amendments setting forth the evidence correctly and eliminating unnecessary matter, colloquy and argument. No opportunity to present these to the trial court or judge was ever afforded this appellee, no notice of a time of presentation of the Statement and objections and amendments thereto to the court or judge ever having been given this appellee and the Statement having been "settled and approved" by order of Judge Ling on October 29, 1936, without presence of counsel for this appellee and without knowledge that the same would be considered by said Judge Ling. Promptly upon notice of said order having been made and the Statement so approved by Judge Ling having been filed, this appellee moved to vacate the order of approval, setting forth the many reasons why said Statement was not "full, true, complete and properly prepared" and also setting forth that said Judge Ling was without jurisdiction to settle and allow the Statement, the motion being argued on November 10, 1936 and on the same day denied by Judge Ling. It is therefore incontestably shown that this appellee, not only did *not* consent to, nor acquiesce in, the bringing up of such a record and calling it a "Statement of Evidence" but that he has objected thereto and pointed out both to appellants and the court what he deemed the proper procedure, and there is no justification for the course followed by appellants. The record shows that although the appeal was allowed on February 5, 1935, a proposed Statement of Evidence was not lodged by appellants until fifteen months later, May 6, 1936, and that notwithstanding this proposed Statement consisted of 364 typewritten pages and an examination of each page was required, this appellee prepared his objections and proposed amendments (comprising 60

pages) and filed the same on June 30, 1936, the court having granted him *over* the objection of counsel for appellants until July 1st in which to file same; and from June 30th to October 29th, 1936, no effort was made by appellants to have their Statement and the objections and proposed amendments of this appellee settled by the trial judge, who was continuously in the District (see certificate of Judge Jacobs, Ex. A) and no *notice of presentation of same to the court or judge for settlement was given to this appellee during that time, or at all.*

Rule 38 of the District Court of Arizona provides with respect to settlement of bills of exception:

> "The adverse party shall within 10 days thereafter in like manner serve and file amendments to the bill. After the expiration of the time allowed, the bill and amendments shall be presented to the judge for settlment *upon notice to the adverse party. If no amendments are filed, no notice of presentation shall be required.*" (Italics ours.)

and further provides that "preparation, allowance and approval of records on appeal and Statements of Evidence in Equity cases are governed by equity rules 75, 76 and 77." This appellee believes that both this rule and Equity Rule 75 make it mandatory that notice of the time and place of presentation for settlement of either a bill of exceptions or Statement of Evidence must be given the adverse party, where amendments have been filed, and where settlement is made without such notice, the bill or statement must be stricken.

> See, City of Woodward v. Caldwell (10 C.C.A.) 86 Fed. (2) 567.

Sound reason dictates the rule that only the trial judge shall settle a Statement of Evidence, for endless confusion would invariably result through another judge with no knowledge of the facts attempting to pass on disputed matters, thus working an injustice upon litigants and placing a heavy and entirely unnecessary burden on the appellate court. This is exemplified in the instant case, and both Equity Rules 75 and 46 negative any presumption that it was contemplated that any judge but the trial judge should certify as correct a record concerning which he has no knowledge.

In the case of Trust Co. of Florida v. Gault, 69 Fed. (2) 133, the court said:

> "Testimony taken in open court under Equity Rule 46 *** cannot become a certifiable part of the record otherwise than by an authentication and filing under the order of *the judge who heard it.* (Buessel v. United States (C.C.A.) 258 F. 812." (Italics ours.)

In the latter case (Buessel v. United States, 258 Fed. 811) the manner in which the testimony in both Bills of Exception and Statements of Evidence shall be brought before an appellate court, is discussed at length, and the following language used:

> "Whatever may or may not have been the practice in this circuit prior to 1912 in the matter of preparing a record in an appeal, the subject is governed by rules 75, 76 and 77 as framed by the Supreme Court, and that there is no power in this court to exempt a particular case from their op-

eration. The rules ***** have the authority of statutory regulation."

"Equity Rule 75 prescribes the procedure for drawing onto the record a condensed statement of the trial proceedings. It contemplates one statement and one only. If counsel cannot agree upon a fair condensation of the evidence, *the trial court is empowered* to direct a proper statement." (Italics ours)

First Nat. Bank of Ardmore v. Bonner, (10 C. C.A.) 74 Fed. (2) 139.

And see:

In re Equity Rule 75 (6 C.C.A.) 222 Fed. 884, (886);

Barber Asphalt & Pav. Co. v. Standard Asphalt & R. Co., (7 C.C.A.) 16 Fed. (2) 751;

The case of Sommer v. Rotary Lift Co., decided by this court in 1933 (66 Fed. (2) 809), points out the manner and procedure contemplated in the preparation of a proposed statement on appeal under Equity Rule 75, stating that it is much the same as the preparation of a proposed Bill of Exceptions "and the presentation by the appellant of this proposed statement, with the appellees' objections thereto to the judge for settlement." In that case (which was a record on appeal in an injunction matter) this court directed the appellant to prepare a statement on appeal "in accordance with the provisions of rule 75 *for settlement by the trial judge.*" (Italics ours).

In the case of Barber Asphalt Pav. Co. v. Standard Asphalt & R. Co., 275 U. S. 372, 72 L. Ed. 318, it is shown that the trial judge having died without certifying and authenticating the record on appeal, "the court called and examined some of its officers respecting the identity of the evidence received and filed." This would seem to be the proper procedure to follow *where the trial judge had died or was otherwise disabled*, but even this measure of proof was not attempted in the case at bar, notwithstanding the trial judge was not laboring under any disability, was in the District and could have settled the Statement of Evidence had it been presented to him.

In Malony v. Adsit, 175 U. S. 281, 44 L. Ed. 163, the court used the following language with respect to the necessity of the *trial judge* settling and allowing a Bill of Exceptions:

> "An inspection of this record discloses that the bill of exceptions was not settled, allowed, and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial. What took place at the trial, and is a proper subject of exception, can only be judicially known by the judge who has acted in that capacity. Such knowledge cannot be brought to a judge who did not participate in the trial or to a judge who has succeeded to a judge who did, by what purports to be a bill of exceptions, but which has not been signed and allowed by the trial judge."

Subsequent to this decision, the statute was amended providing the manner in which the bill might be settled where by reason of "death, sickness or other disability" the trial judge could not settle same. The construction of what is meant by "other disability" of a judge, is considered at length in a well reasoned opinion in the case of Ulmer v. U. S. (2 C.C.A.) 266 Fed. 176, wherein it was held that absence of the trial judge from the district was not a "disability" within the meaning of the statute.

And the Circuit Court of Appeals for the 4th Circuit held in Norwood v. U. S., 18 Fed. (2) 577, that the power of another judge to allow and sign a Bill of Exceptions depended upon the *record showing* that the trial judge was ill or otherwise disabled, the court adding "and it is admitted that he was not." In the instant case, the record shows by motion made by this appellee to vacate the order of Judge Ling settling and allowing the Statement of Evidence filed, that the trial judge was, at all times, in the District and not laboring under any disability, and that fact has never been disputed. See, also, Exhibit "A."

That a retired Federal judge is still in service and may hold court in his District without designation, has been held by this Court as well as by the Supreme Court of the United States.

McDonough v. U. S. (9 C.C.A.) 1 Fed. (2) 147;

Maxwell v. U. S. (4 C.C.A.) 3 Fed. (2) 906;

Booth v. U. S., 291 U. S. 339, 78 L. Ed. 836.

This appellee submits that under the authorities

cited and the statement of facts herein presented, his motion to strike the Statement of Evidence, should be granted.

Respectfully submitted,

THOMAS W. NEALON

ALICE M. BIRDSALL
Counsel for Appellee,
George E. Lilley, Trustee
in Bankruptcy of Windsor
Square Development, Inc.,
a corporation.

"EXHIBIT A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

B-570 In the Matter of
WINDSOR SQUARE DEVELOPMENT, INC.,
a corporation,
Bankrupt.
} EXCERPT OF DOCKET ENTRIES

DATE Mo. Day Year		FILINGS-PROCEEDINGS
Oct. 25 1930	1	File Petition & Schedule in Triplicate
Oct. 25 1930	2	File Resolution of Board of Directors
Oct. 28 1930	3	Enter and file Order of Adjudication and Reference
Nov. 19 1930	4	File Bond of Trustee
Dec. 12 1930	5	File Amended Schedules in Triplicate
Feb. 12 1931	6	File Praecipe & issue Subpoena to L. D. Owens Jr.
Feb. 14 1931	7	File Subpoena L. D. Owens Jr. executed
Apr. 24 1931	8	File Proof & Claim of Lien
July 21 1931	9	File Order to Show Cause on Trustee's Petition to Marshal Liens & Sell Free & Clear of Encumbrances, with Marshal's return thereon.
Jan. 22 1932	10	File Stip that respondents Barringer & Phx. Title & Tr. Co. have to Jan. 22, 1932 to file opening briefs

DATE Mo. Day Year			FILINGS-PROCEEDINGS
Jan.	22	1932 11	File Brief of Intervenor Barringer
Nov.	18	1932 12	File Referees Cert. of Review on Pet. of Margaret B. Barringer, & Documents pertinent thereto
Nov.	18	1932 13	File Referees Cert. of Review on Pet. of Phoenix Title & Trust Co., & Documents pertinent thereto
Nov.	18	1932 14	File Exhibits to above certificates of Review (12-13), in three parts
Nov.	28	1932	Referees Cert. of Review on Pet of M. B. Barringer & Referees cert. of Review on Pet. of Phx. Title & Tr. Co. on for hearing. Order strike from L & M cal to be reinstated on Mo. of the parties, Mo. Mackay & consent Nealon.
Dec.	6	1932 15	File Mo. of Margaret B. Barringer to Strike Referees Summary of Evidence & for Order requiring Referee to certify Transcript of Reporters notes as part of Record on Review.
Dec.	6	1932 16	File Memo of points & Auths. support above Mo. (15)
Dec.	8	1932 17	File Mo. of Phx. Title & Tr. Co. for Order requiring Referee to Certify Transcript of Reporters notes as part of Record on Review.
Dec.	8	1932 18	File Memo of Auths. support of above Motion (17)

DATE Mo. Day Year		FILINGS-PROCEEDINGS
Dec. 8 1932	19	File Exceptions of Respondent Phx Title & Tr. Co. to Referees Summary of Evidence.
Dec. 8 1932	20	File exceptions of Respondent Margaret B. Barringer to Referees Summary of Evidence.
* * * *		
Dec. 19 1932	21	File Trustees points & authorities on Review
Dec. 19 1932	.....	Referees Cert. of Review (12); Mo. of Barringer to Strike Referees Summary, etc. (15); Mo. of Phx. T. & T. Co. for Order requiring Referee to certify Trans. (17); exceptions of Phx. T. & T. Co. (19); & exceptions of Barringer (20); on for hearing. Order Con't. & reset for hearing Jan. 3, 1933, Mo. Mackay.
Jan. 3 1933	.....	Referees Cert. on Review (12); Mo. of Barringer to Strike Referees Summary etc. (15); Mo. of Phx. T. & T. for Order requiring Referee to Certify Trans. of Reporters notes (17); Exceptions of Phx. T. & T. to Referees Summary of Evidence (19); & Exceptions of Barringer to Referees Summary of Evidence (20), on for hearing. Order cont. & reset for hearing Jan. 16, 1933, Mo. Mackay.

DATE Mo. Day Year		FILINGS-PROCEEDINGS
* * * *		
June 29 1934	.....	Order Cert. Review set for hearing at Prct. Aug. 7, 1934.
* * * *		
Dec. 14 1934	35	File Court's Memo on ruling on Referee's Order.
Dec. 17 1934	.....	Order vacate Order Approving & Confirming Referee's Order to Allow Petrs. file further Auths.
Jan. 7 1935	.....	Order Referee's Order fixing & Marshalling liens determining priorty thereof & adjudging certain asserted liens & interests null & void approved and affirmed. Exception for Respondents Barringer & Phx. Title & Trust (Nos. 12 & 13).
* * * *		
Jan. 8 1935	37	File Brief of Respondents Phx. Title & Trust Co. & Barringer.
* * * *		
May 6 1936	75	File Notice of Filing Stmt. of Evid & fixing time for approval thereof.
May 18 1936	.....	Order call Stmt. of Evidence for approval Cont. May 25 Mo. Nealon & extend Trustees time within which to file Obj's. to proposed Stmt. of Evid. to & inc. May 25.
* * * *		
June 30 1936	78	File Objections & Amendments of Geo. E. Lilley to proposed statement of Evidence

Oct. 14 1936 84 File Copy Order of Circuit Court Extending time to file record to Nov. 15, 1936.

DATE Mo. Day Year		FILINGS-PROCEEDINGS
* * * *		
Dec. 16 1936	96	File Praecipe for supplemental transcript.
Dec. 18 1936	97	File Praecipe for supplemental transcript.
Dec. 18 1936	.....	Issue Supplemental Trans. on Appeal.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

In the Matter of Windsor Square Development, Inc., a corporation, Bankrupt. } No. B-570 Phoenix

I, F. C. Jacobs, do hereby certify that I am judge of the United States District Court for the District of Arizona and have been such judge since March 19th, 1923.

That as such United States District Judge, there was brought before me for review on November 18, 1932, upon the petition of Margaret B. Barringer and the Phoenix Title and Trust Company, an order in the above entitled matter of the Referee in Bankruptcy "marshalling liens and ordering property sold free and

clear of liens," said order being dated September 17, 1932, and that I heard and determined said reviews and proceedings in connection therewith and entered an order approving and confirming the Referee's order, from which appeals are now being prosecuted to the Circuit Court of Appeals for the 9th Circuit;

That I have been continuously within the District of Arizona from the 30th day of June, 1936; that I have not been laboring under any disability and that I have been ready and able to settle the Statement of Evidence and any objections and proposed amendments thereto on said appeals had the same been presented to me; that the Statement of Evidence lodged in said proceedings by the appellants on May 6, 1936 and the objections and proposed amendments thereto of the appellee, George E. Lilley, filed in the United States District Court at Phoenix on June 30, 1936, have never been presented to me for settlement and approval.

Dated at Phoenix, Arizona, this 16th day of April, 1937.

F. C. JACOBS,
United States District Judge for the District of Arizona.

ENDORSED:

FILED
Apr. 16, 1937

EDWARD W. SCRUGGS,
Clerk United States District
Court for the District of Arizona
By Helen Roach,
Deputy Clerk

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA
District of Arizona } ss.

I, EDWARD W. SCRUGGS, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect, and complete copy of excerpt of Docket Entries, and of Certificate of F. C. Jacobs, United States District Judge, filed April 16, 1937, in case number B-570-Phoenix, In the Matter of Windsor Square Development, Inc., a corporation, Bankrupt, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court this 17th day of April, 1937.

EDWARD W. SCRUGGS,
Clerk.

By H. M. CALDWELL,
Deputy

UNITED STATES
DISTRICT COURT
SEAL

"EXHIBIT B"
AFFIDAVIT

STATE OF ARIZONA
COUNTY OF MARICOPA } ss.

ALICE M. BIRDSALL, being first duly sworn upon oath, deposes and says:

That I am one of the counsel for George E. Lilley, Trustee in Bankruptcy of Windsor Square Development, Inc., a corporation, one of the appellees herein, and that as such counsel, I presented to the Honorable R. W. Smith, Referee in Bankruptcy, on the 27th day of July, 1932, form of order and decree "marshalling liens and ordering sale of property," which had been prepared by counsel for said Lilley upon the instruction of said Referee when he announced his decision March 22, 1932;

That on said 27th day of July, 1932, at the request of William H. Mackay, counsel for Margaret B. Barringer, I entered into a stipulation in writing with counsel for Barringer that the entering of said decree, subject to the approval of the Referee, might be postponed until after September 15, 1932, said postponement being for the convenience of said Mackay who desired to leave on a vacation and wished to take a review of said decree when entered;

That on said date, I went with said Mackay to said Referee taking said prepared order and said stipulation and that upon said stipulation, said Referee signed an order postponing the entering of said order and decree in accordance with said stipulation and filed the stipulation and his order made thereon in the records of said case;

That the said draft of the order and decree aforesaid

was left with said Referee on said date; and was entered by him on September 17, 1932; that said stipulation with the order thereon signed by said Referee and endorsed with the filing mark of July 27, 1932 was transmitted by said Referee as a part of the proceedings and pleadings made a part of his certificate of review filed in the office of the clerk of the United States District Court for the District of Arizona at Phoenix on November 18, 1932, and that the same has been since said date and is now, on file in said clerk's office as a part of the certificate of review in said matter; that counsel for appellee Lilley in praecipe for additional portions of record on appeal to this court in cause No. 7765, filed on March 21, 1935, included therein "record of proceedings before Referee transmitted by Referee with certificate of review" but that said stipulation and order of the Referee thereon was not transmitted to this court as a part of the record on appeal by the clerk of the United States District Court for the District of Arizona; that the same was not included as a part of the Referee's Certificate of Review in the Statement of Evidence filed herein; that I have personally examined the records and proceedings in this cause in the office of the clerk of the United States District Court for the District of Arizona at Phoenix, and know the statements made herein concerning the records therein to be true.

ALICE M. BIRDSALL

Subscribed and sworn to before me this 17th day of April, 1937.

(NOTARIAL SEAL)

GEORGE M. HILL
Notary Public

My commission expires:
March 17th, 1939.